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No. 04-818

IN THE

Supreme Court of the United States

VERNON EVANS, JR.,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

REPLY BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether the *Ex Post Facto* Clause of the Constitution prohibits sentencing a person to death under a statute that was enacted after the charged offense took place and that lowers the State's burden of proof at sentencing, and increases the defendant's.

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The State's brief in opposition fails to come to terms with Evans's argument that his sentencing to death under the wrong statute violated the *Ex Post Facto* Clause and flouted this Court's decision in *Carmell* v. *Texas*, 529 U.S. 513 (2000). Instead of squarely addressing *Carmell*, the State resorts to an inapplicable defense under *Teague* v. *Lane*, 489 U.S. 288 (1989), and then, when it does address the merits, offers only successive pages of block quotations from a pre-*Carmell* case, *Booth* v. *State*, 608 A.2d 162 (Md. 1992), which, as we explained in the Petition, is irrelevant and wrongly decided because it mistakenly failed to consider the fourth category of *ex post facto* laws. The State's inability to provide any further support for the decision below only underscores that the Maryland Court of Appeals defied this Court's decision in *Carmell* and that plenary review—and perhaps even summary reversal—by this Court is warranted.

I. *TEAGUE* DOES NOT BAR THIS COURT'S REVIEW.

The State incorrectly argues that, in order for Evans to prevail on his *ex post facto* claim, he must establish that *Carmell* v. *Texas*, 529 U.S. 513 (2000), has retroactive effect under *Teague* v. *Lane*, 489 U.S. 288 (1989). *Teague*, however, does not apply to this case because it applies only to federal habeas review, not direct appellate review of a state court decision. *See Beard* v. *Banks*, 124 S. Ct. 2504, 2511 (2004) ("*Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant 'habeas corpus relief to . . . state prisoner[s].'"); *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) (*Teague*'s "nonretroactivity principle prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final."); *Teague*, 489 U.S. at 310 (plurality opinion of O'Connor, J.) ("[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review.").

The State boldly ignores this black-letter law and instead assumes, without reasoning, that *Teague* applies to this Court's *direct review* of the Court of Appeals of Maryland's decision. The State would have *Teague* preclude *any* review of that decision or, for that matter, of any other state post-conviction decision applying a new rule of constitutional procedure—no matter how poorly reasoned the state court's opinion and regardless of whether (as here) a state court has blatantly disregarded binding precedent of this Court. Nothing, however, in *Teague* or its progeny restricts this Court's appellate power over state court decisions. *Cf. Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 350 (1821) ("[W]herever a case is fit for judicial cognizance, or wherever the State tribunals take cognizance of it, whether properly or not, the appellate power of this Court may intervene, and protect the constitution and laws of the Union from violation."); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-348 (1816); S. Ct. R. 10 (certiorari review appropriate where "a state court . . . has decided an important federal

question in a way that conflicts with relevant decisions of this Court.").

Furthermore, even if *Teague* applied to direct review of state court decisions, it would not be implicated in this case. As an initial matter, the State never raised *Teague* in the trial court and thus waived the point. *See Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n. 4 (2002); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."); *cf. Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). Probably for this reason, the Court of Appeals did not address, let alone rely on, *Teague* in its decision upholding the sentencing of Evans under the wrong death-penalty statute. Because the State has waived any right to rely on *Teague* at this later stage, even a federal court reviewing a habeas petition would not need to apply it. *See Parke* v. *Raley*, 506 U.S. 20, 25 (1992) (reviewing case on merits where State failed raise *Teague* argument below); *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (holding that *Teague* rule is not jurisdictional and may be waived).

Teague is also inapposite because it applies only to *new* constitutional rules, and *Carmell* does not introduce a new rule. "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. *Carmell* did not announce, and Evans does not rely on, any new constitutional principle. Evans's claim, based on *Calder* v. *Bull*'s fourth category of *ex post facto* laws, is *not* based on a new rule. It is instead based on the application of a very old rule, first announced by the Supreme Court in 1798. *See Booth-El* v. *Nuth*, 140 F. Supp. 2d 495, 517 n.23 (D. Md. 2001) (rejecting argument that *Carmell*'s discussion of fourth category of *ex post facto* laws constituted new rule under *Teague*), *rev'd in part on other grounds*, 288 F.3d 571

(4th Cir. 2002).[1] Indeed, in *Carmell*, this Court stated that, since *Calder*, it "has repeatedly endorsed . . . the fourth category" of *ex post facto* laws on which Evans's claim relies. *Carmell*, 529 U.S. at 525. And the Court expressly rejected the argument that it had previously "cast out the fourth category" in *Collins*. *Id.* at 537. *Carmell* thus announced no new rule, but merely reaffirmed the validity of a 200-year-old rule.[2]

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[1] Even the Fourth Circuit, which rejected the *ex post facto* claim in *Booth-El*, did not attempt to invoke *Teague* to support its decision. *See* 288 F.3d at 576-580.

[2] Even if *Carmell* could be construed to announce a new rule, it would fall within *Teague*'s exception for substantive rules. *See Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2522-2524 & n.4 (2004). A substantive rule "narrow[s] the scope of a criminal statute" or "place[s] particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 2522. In *Carmell*, this Court held that the application of any law that lowers the State's burden of proof violates the *Ex Post Facto* Clause because "[r]educing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end" as when "the government subverts the presumption of innocence by reducing the number of elements" of the crime. 529 U.S. at 532-533. In both instances, the State alters the very definition of the crime. *Compare Dobbert* v. *Florida*, 432 U.S. 282, 292-297 (1977) (finding no *ex post facto* violation where statute merely changed the role of judge and jury in imposition of death sentence).

If the Court were to characterize *Carmell* as a new *procedural* rule, it would fall within the second *Teague* exception because it implicates "the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, 124 S. Ct. at 2524 (internal quotation omitted). In *Carmell*, the Court described laws in the fourth *Calder* category as "manifestly unjust and oppressive," 529 U.S. at 532 (quoting *Calder*, 3 U.S. (3 Dall.) at 391), and stated that the Constitution's prohibition on such laws serves "*a fundamental fairness interest*" *id.* at 532-533 (emphasis added). The use of a statute that impermissibly alters the burden of proof in favor of the State "seriously diminishe[s] accuracy" and creates an "impermissibly large risk" that, under the correct statute, a different result would have obtained and the State may end up "punishing conduct the law does not reach." *Schriro*, 124 S. Ct. at 2525 (internal quotations omitted).

II. EVANS'S SENTENCING UNDER THE NEW DEATH-PENALTY STATUTE VIOLATED THE *EX POST FACTO* CLAUSE.

When it does reach the merits of Evans's *ex post facto* claim, the State fails to address Evans's arguments, instead relying almost exclusively on an outdated case, *Booth* v. *State*, 608 A.2d 162 (Md. 1992). Evans's core claim is that *Booth* can no longer be considered good law after this Court's decision in *Carmell*. Instead of substantively responding to that argument, however, the State simply inserts lengthy block quotations from *Booth* itself, never explaining how it can survive after *Carmell*.

The reason behind the State's omission is clear: To the extent *Booth* ever was good law, it is no longer. As explained in the Petition, *Booth* was effectively overruled by this Court's decision in *Carmell*, in which the Court explicitly clarified that there are four, not three, categories of *ex post facto* laws. Pet. 6. *Booth* is fundamentally flawed because it was expressly premised on the assumption that there were only three categories of *ex post facto* laws and that Maryland's post-July 1, 1983 death-penalty statute did not fall into any of those three categories:

> The prohibition against *ex post facto* laws is defined by *three* historic categories.... The change to the [death-penalty statute] did not deprive [the defendant] of any defense to the crime of murder that was available at the time of the murder [*i.e.*, no violation of the first *Calder* category]. The change, which involves only procedures at the sentencing phase of trial, does not fit in *either* of the other *ex post facto* categories.

Booth, 608 A.2d at 175 (emphases added) (citations omitted). Given that Evans's claim relies on the fourth category of *ex post facto* laws, it is baffling that the State would rely almost exclusively on *Booth*, which contained *no* discussion of that category at all.

Nor does the State's repetition of *Booth*'s argument that the change in Maryland's death-penalty law was merely "procedural" (Opp. 13, 16, 18) help the State's case. First,

the change in Maryland's statute was not procedural, if that term is understood to mean a change that may harm some defendants but that might help others. The statutory change at issue here can only harm defendants, and it never harms the State. Second, as explained in the Petition (*see* Pet. 14 n.7), any procedural/substantive distinction is not relevant to defining violations of the *Ex Post Facto* Clause. The Court noted in *Collins* that although several of this Court's cases "have described as 'procedural' those changes which . . . do not violate the *Ex Post Facto* Clause," 497 U.S. at 45, and have looked beyond the *Calder* categories to define the scope of the *Ex Post Facto* Clause based on a procedural substantive/distinction, *id.* at 45-46, "simply labeling a law 'procedural' . . . does not immunize it from scrutiny under the *Ex Post Facto* Clause," because "*the prohibition which may not be evaded is the one defined by the Calder categories*," *id.* at 46 (emphasis added). Indeed, the Court stated expressly in *Carmell* that *Collins* put to rest the procedural/substantive distinction, which the Court characterized as a "doctrinal hitch that had developed in our cases." *Carmell*, 529 U.S. at 539. The State's attempt to resurrect the distinction here is just a means to avoid the real question—whether Maryland's statutory change falls within *Calder*'s fourth category.

The State also erroneously contends, again in indiscriminate reliance on *Booth*, that the *Ex Post Facto* Clause does not apply in this case because "[n]one of the purposes of the prohibition against *ex post facto* laws would be served by applying the prohibition here." Opp. 15 (quoting *Booth*, 608 A.2d at 172-176). In particular, the State notes that the *Ex Post Facto* Clause was intended to provide notice of changes in law and prevent vindictive legislation, and that the application of the new death-penalty statute implicated neither purpose. Opp. 15-16. But as this Court made clear in *Carmell*, the *Ex Post Facto* Clause is defined by the four *Calder* categories, not by whether a statutory change implicates the purposes of the Clause. 529 U.S. at 539.

In any event, *Carmell* explains that the purposes cited by the State "are not [the Clause's] only aims." 529 U.S. at 531 n.21. In fact, "[t]he fourth [*Calder*] category . . . resonates harmoniously with one of the *principal interests* that the *Ex Post Facto* Clause was designed to serve, fundamental justice." *Id.* at 531 (emphasis added); *see also id.* at 534 ("The Framers, quite clearly, viewed [the lowering of the state's burden of proof] as grossly unfair, and adopted the *Ex Post Facto* Clause accordingly."). Indeed, *Carmell* notes "[t]here is plainly a fundamental fairness interest, *even apart from any claim of reliance or notice*, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Id.* at 533 (emphasis added).

In the last two pages of its argument (Opp. 17-18), the State finally attempts to address the applicability of the fourth *Calder* category to the new death-penalty statute. But the State's basic approach is merely to quote from the Court of Appeals of Maryland's decision below without ever confronting Evans's detailed arguments showing why that decision was wrong. *See* Pet. 14-17. The State's slipshod approach demeans the seriousness of the constitutional arguments presented and the fact that the life of Vernon Evans, Jr. hangs in the balance. The State's inability to muster anything better, however, is telling.

Finally, the State wrongly contends that there was no *ex post facto* violation because Evans suffered no "detriment." Opp. 18. According to the State, "[u]nder either statute, Evans had to present evidence of intoxication sufficient to convince the jury that such intoxication mitigated against imposition of the death penalty," and "the jury did consider his drug use, citing it as a mitigating factor." *Id.* Evans does not dispute that he was required to present evidence of intoxication under both statutes. His constitutional claim, however, is that that the new death-penalty statute required him to prove, in order for intoxication to be considered a mitigating factor, *both* (1) evidence of intoxication,

and (2) that the intoxication mitigated, rather than aggravated (or was neutral on), his culpability.

This change increased the burden on Evans and lowered the burden on the State, in violation of the *Ex Post Facto* Clause. The fact that the sentencing form shows that one or more jurors "did consider his drug use" (Opp. 18) does not change the fact that, in applying the new statute, *all of the jurors considered the issue of intoxication in a fundamentally different light than if they had been instructed that intoxication was necessarily, as a matter of the judgment of the Legislature, a mitigating circumstance.* Indeed, under the new statute, the jurors were permitted to disregard intoxication altogether. If the court had applied the correct statute and that had changed how just one juror balanced the aggravating and mitigating factors, Evans's life would have been spared.

CONCLUSION

The State's brief in opposition fails to offer any meaningful defense of the decision below. The petition for writ of certiorari should be granted and, as suggested in the Petition, the Court may wish to consider summary reversal, either to remand for a new sentencing or to modify Evans's sentence to life imprisonment.

Respectfully submitted,

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